UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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TIRE ENGINEERING & DISTRIBUTION,

Plaintiff,

v. 13 CV 6209 (JMF)

INDUSTRIAL & COMMERCIAL BANK OF CHINA,

Defendant.

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New York, N.Y.
October 16, 2013
3:00 p.m.

Before:

HON. JESSE M. FURMAN,

District Judge

APPEARANCES

STARR & STARR
ATTORNEY for Plaintiff Tire Engineering
BY: STEPHEN STARR

WEISBROD, MATTEIS & COPLEY
ATTORNEY for Plaintiff Bearcat Tire
BY: WILLIAM COPLEY

ALLEN & OVERY
Attorney for Defendant I & C Bank of China
BY: ANDREW RHYS DAVIES
BRADLEY PENSYL

(Case called)

MR. STARR: Stephen Starr for the plaintiff. I have here my cocounsel, William Copely, and I would like to move for his admission pro hac vice to appear before your Honor today.

THE COURT: I will grant it for today's purposes, but if you intend to appear beyond today, then you need to file a pro hac vice motion in the formal manner. If you have any questions about that, you can contact the clerk's office, but for today's purposes, I will grant it.

MR. COPELY: Thank you.

THE COURT: For the defendant.

MR. DAVIES: Andrew Rhys Davies. I'm here with my colleague, Bradley Pensyl, for Industrial & Commercial Bank of China.

THE COURT: Good afternoon to you. We are here largely in connection with your letter, Mr. Davies. I can't remember if it was from you or not.

Do you want to fill me in on where things are?

MR. DAVIES: Yes. We had written to your Honor and to Judge Patterson in Part One because Industrial & Commercial Bank of China had received a restraining notice in a postjudgment collection matter. It purports to apply to accounts outside of New York. The bank has informed the plaintiff/judgment creditor that it has no accounts in New York. We think that this relief is barred by the separate

entity rule and, in fact, these judgment creditors litigated this very issue against another Chinese bank before Judge Carter. Judge Carter found in favor of the Bank of China, dismissed the complaint, and the judgment creditors took an appeal. We argued that to the Second Circuit on Friday of last week, and that's under submission before the Second Circuit panel.

We did meet and confer in compliance with your Honor's order. And we learned that, in fact, the plaintiff/judgment creditor doesn't intend to serve the complaint. It apparently recognizes that the issue is before the Second Circuit, and that's putting words in their mouths, that while Judge Carter's order remains, then they can't have the turnover order they're looking for.

We are ready to move for relief from the restraining notice. We understand that we need to do that under applicable law. We can't simply ignore it, even though, in our view, it's clear, it doesn't apply to accounts outside of New York. We're ready to file that motion. We discussed yesterday filing it on October 25, which would be a week from Friday. Plaintiff would like two weeks to respond, and we would respectfully request a week to reply.

THE COURT: I take it, the idea would be that this would be litigated in the context of the miscellaneous docket number, not the 13 CV 6209 that was originally assigned to me.

Is that correct?

MR. DAVIES: I think that would be right because the complaint won't be served, and so we only have the restraining notice issue.

THE COURT: Mr. Starr, or anyone who wants to speak.

MR. COPELY: Actually, if I can address that. William Copley. Good afternoon.

Just to give you a little bit of background about this case and about what's gone on. My client is a 74-year-old inventer and businessman who obtained a $26 million judgment against several foreign companies that had stolen his intellectual property and copied his designs and basically destroyed his business. He obtained a $26 million judgment, and that's what we're trying to enforce. Some of the wrongdoers have accounts in several Chinese banks, the Bank of China, which was the case that was before Judge Carter, as well as the Industrial & Commercial Bank of China, which is the defendant, the garnishee here.

What we're trying to do in this case, there was one important point that I think Mr. Davies left out in his recitation of what happened in front of Judge Carter; and that is, Judge Carter specifically left a restraining notice in effect in that case pending appeal to the Second Circuit's ruling.

The whole point of the restraining notice under 5222

is so that the assets can be held in place while all of the different claims can be assessed and all of the objections are weighed out. That's all we're trying to do in this case with the restraining notice.

And Judge Carter specifically left it in place pending appeal because of both the strength of our arguments. He said, notwithstanding his decision, there's a substantially likelihood we'll prevail on appeal. He also noted that we'd be irreparably harmed if the bank were allowed to release the assets before there was a definitive ruling on this issue of law that's been very much disputed. We have what we think are six federal district court decisions going our way. I believe there are four federal district court decisions going their way.

One important thing is in every single one of the federal district court decisions going their way, the district court in that case actually entered an injunction requiring the bank to hold onto the assets until the Second Circuit could rule. Judge Preska did it in the *Shaheen Sports* case. Judge Rakoff did it in *Motorola v. Uzan*. Everybody agrees these assets should just stay in place until the Second Circuit can rule.

As Mr. Davies said, we argued this issue to the Second Circuit on Friday. We are hopeful to have a ruling soon. Our view is certainly we're not asking you to do anything Judge

Carter didn't allow us to do, which is to use a restraining notice to keep the assets in place until the Second Circuit can give us a definitive ruling on what New York law is. Therefore, we don't think there's a collateral estoppel problem. Even if there were a collateral estoppel issue, Judge Carter clearly ruled that all of the elements for the Court to exercise its equitable power to stay any result would be implicated and properly applied.

THE COURT: Do you agree in the Second Circuit's decision on the Judge Carter case will be dispositive of the issues in this case?

MR. COPLEY: Unless they surprise me on how they write their opinion, I would expect it would be. If the Second Circuit says we're not entitled to the turnover, the separate entity rule bars that, we're not going to serve the complaint. We'll dismiss it. But if it says we're entitled to the money, we want everything to be in place, so we can then pursue the turnover of the assets that my client would be entitled to.

THE COURT: Thank you. That was very helpful.

Mr. Davies, number one, do you agree? Obviously, you would argue, as you did in your letter, and it sounds like there's no dispute, that if the Second Circuit affirms Judge Carter and says that the separate entity rule bars their going after these assets, then it sounds like you're free and clear, and they're going to walk away from this. Now my job gets

easier.

Now, if they go the other way, do you concede that you would not have a basis for the motion that you intend to bring and/or the motion to dismiss if or when you're served on this ground; in other words, I guess what I'm trying to get at is whether the Second Circuit's decision will be dispositive?

MR. DAVIES: I would expect the Second Circuit's decision will be dispositive on this issue, yes. But may I address just the question of the restraint that Mr. Copley mentioned?

He is talking about a restraint pending further action in the Second Circuit. I think Judge Carter's case -- that's very troubling for ICBC because, first of all, we don't think there's a basis for it. To get an injunction from a federal court, you have to make a motion of showing and they haven't made that showing.

And in this case, Chinese law doesn't allow Chinese banks to freeze accounts in China unless there's an order from a Chinese court. So, we'd be caught in this double-liability situation whereby we could be ordered to maintain an account and also be required, under Chinese law, to pay that to the account-holder.

We think if they want a restraint from this Court, they should make a motion, which we'd like to oppose, and perhaps we can do that in connection with a briefing that we

discussed.

THE COURT: Am I wrong: They already have a restraint, right?

The question is, if I think his point was simply, if I understood it, if you persuade me that the restraint was improperly granted in the first instance, that I should do the same as Judge Carter, Judge Rakoff, and Judge Preska did and stay the vacatur of the restraining order pending the Second Circuit's decision; is that correct?

MR. COPLEY: That is correct, your Honor.

THE COURT: I take it your argument is that I, A, should vacate it, and, B, should not then stay the vacatur.

MR. DAVIES: That's certainly right.

What Judge Preska did in *Shaheen Sports* was just to give plaintiff a short extension of an existing preliminary injunction so that that plaintiff could go ask the Second Circuit for a further injunction pending appeal.

THE COURT: What happened then?

MR. DAVIES: What happened is that Judge Preska was good enough to tell the plaintiff that it needed to move the Second Circuit within ten days of the 1292(b). Because it was an interlocutory appeal, she sui sponte certified, and the plaintiff apparently misunderstood, waited 30 days and then appealed. One of the grounds for the appeal was that Judge Preska tried to reduce the appeal time to ten days, so the

appeal got dismissed for failure to timely file the petition.

In Judge Rakoff's case of *Motorola*, Judge Rakoff was clear that because under Rule 69, in postjudgment proceedings, state law governs, and you can't get a preliminary injunction. That doesn't waive the separate entity rule. He did stay a decision pending appeal, but he also ordered the plaintiff to post a million dollars' bond in case the bank in that case would be harmed. Ultimately, it went on appeal.

We think there are issues to be litigated on this question. There's no question of whether there should be a stay pending appeal. It's not quite as simple as Mr. Copley perhaps said.

THE COURT: Maybe they won't be able or willing, but if they were willing to post a similar bond, would that do away with this?

MR. DAVIES: I don't think it would. I don't think there are grounds for the stay of an injunction. There's potential criminal regulatory liability in China. So, a monetary bond is part of the issue here. But I just wanted to throw out that there is this requirement of security, and they can't just have an injunction or a stay without doing their part of what's required to get a stay on the injunction.

MR. COPLEY: We would disagree with that. We think 5222 allows for restraint exactly like we're talking about, without posting a bond. There are significant differences

between this and the *Motorola* case where a bond was required. One, the party there was *Motorola*, which is a multibillion-dollar company. I represent a 74-year-old inventer who has been rendered destitute by the actions of these wrongdoers.

The second point I would raise would be that there was $1.3 billion at issue in the *Motorola* case that prompted the $1 million bond; and here, the amount is much less.

So far, the Industrial & Commercial Bank of China has failed to disclose whether and how much is in any of these accounts, so I don't know how the Court can even set a bond when Industrial & Commercial Bank of China is the only one that can make that disclosure.

MR. DAVIES: Maybe this is something we should be briefing as part of the motion practice we're discussing.

THE COURT: I was about to say that.

MR. DAVIES: If there's going to be effectively a cross-motion in the papers, in their papers, we suggested filing our papers October 25. And they would oppose November 8. Perhaps we can have two weeks to reply and also respond to the cross-motion.

MR. COPLEY: We don't think a cross-motion is necessary. We have a right under 5222. They're arguing for Judge Carter's opinion to be applied here. Judge Carter's opinion should be applied in all respects, meaning the

restraining order stays in effect as it was issued under 5222 until the Second Circuit rules. That's what Judge Carter did; and that's what this Court should do. We don't think we have to make an affirmative motion for an injunction because 5222 gives us what we seek.

THE COURT: Except in Judge Carter's case, as I think I see on the docket, is after his decision on the restraining order itself. There was a separate motion to stay. I think that may be what Mr. Davies is driving at, that if he prevailed on the merits, it would essentially be your motion to stay my vacatur of the restraining order.

MR. COPLEY: I'm not sure we need all of the separate steps. We can make the argument in our motion to their motion to vacate that any ruling vacating that should be stayed. I'm not sure we need extra rounds of briefing. We can. I would just ask if we're making that motion, that we would get a reply brief, as well. So, there would be four, rather than three, if we're going to make an affirmative motion.

THE COURT: Mr. Davies, that, at a minimum, sounds reasonable to me. My question to you is, it seems like everybody knows what the arguments and the issues are. Can we not do this in the three briefs you proposed and have you address in your opening brief, A, the merits of the restraining order itself and, B, if I agree with you, why I should not stay my order vacating the restraining order. Then we'll them

respond, A, on the merits and, B, on why I should stay it if I disagree with them, and then you'll have an opportunity to reply and do it that way.

MR. DAVIES: I think that makes sense, your Honor. Can I just suggest, especially in the opening brief, a couple of days, we can incorporate the stay piece into our opening brief.

THE COURT: That's fine with me. I think the longer we put this out, the more likely it is the Second Circuit will resolve this problem for me. Anyway, there you have it.

How about if I give you an extra week?

MR. DAVIES: November 1.

THE COURT: November 1, November 15, and then November 22.

MR. DAVIES: Right before Thanksgiving.

THE COURT: It is before Thanksgiving, not after; that's a material difference. Is everyone on the same page about both the schedule and what the briefs will be addressing?

MR. COPLEY: Yes, thank you.

MR. DAVIES: Yes. Thank you very much.

THE COURT: Is there anything else to address here?

MR. COPELY: Nothing from us.

THE COURT: One question I have about the miscellaneous matter is, is this the sole issue in the miscellaneous matter? I ask that because while I agreed to

take the matter because of the overlap with the case that had been assigned to me, I guess my instinct is it might make sense for me to have it formally reassigned to me, assuming it has not already been formally reassigned. On the other hand, I don't want to inadvertently invite more than I anticipated getting.

MR. COPLEY: Yes, your Honor. In the interest of full disclosure, we know of three cases. There's the Bank of China case already before Judge Carter, there's this case, and then we have served a restraining notice on Agricultural Bank of China, which is another bank. So, they may very well take an approach similar to Industrial & Commercial Bank of China here and file a motion to vacate.

THE COURT: That wasn't what I was driving at.

MR. COPLEY: Sorry.

THE COURT: My question and my concern is if you're filing papers in the miscellaneous matter, it's a purely logistical concern. Right now, it's assigned to Judge Part One a fictional character no one has ever met. The problem is I won't get electronic notification of filings in that case.

My instinct is, I should have the clerk's office formally reassign it to me so when you file things, I will actually get notice that they have been filed.

My only concern is, if I am doing that to litigate this issue, but this is the tail and I don't know about the dog

in this case, I just want to understand what I'm getting myself into.

MR. COPLEY: Yes. I guess my response would be if the Second Circuit comes down against us, there's not going to be very much for your Honor to do. If it comes down in our favor, we obviously will be seeking a turnover order. I imagine there will be some discovery fights.

THE COURT: But that's in the civil case that's already assigned.

MR. COPLEY: Correct.

THE COURT: The litigation and the restraining order case, the miscellaneous matter, I take it the full extent of it is this motion; is that correct?

MR. COPLEY: That's on the docket right now, yes.

THE COURT: I will have the clerk's office reassign that to me so I get notified of any filings in that case.

Is there anything else?

MR. COPLEY: Not from the plaintiffs.

MR. DAVIES: Nothing, your Honor. Thank you.

THE COURT: Thank you very much. We are adjourned.

(Adjourned)